NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. DANIEL EDWARD SOUZA, Petitioner.	2 CA-CR 2008-0023-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20002988

Honorable Frank Dawley, Judge Pro Tempore

REVIEW GRANTED; RELIEF GRANTED IN PART,
DENIED IN PART, AND REMANDED

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V Á S Q U E Z, Judge.

¶1 Following a jury trial, Daniel Souza was convicted of three counts of sexual exploitation of a minor under the age of fifteen and one count of luring a minor under the age of fifteen for sexual exploitation. The charges were based on Souza's having electronically transmitted images of minors engaged in sexual activity and having offered or solicited sexual conduct with "Christy," a Pima County Sheriff's detective whom Souza believed to be a thirteen-year-old girl he had met online. *See* A.R.S. §§ 13-3553, 13-3554. The trial court sentenced him to consecutive, mitigated terms of ten years' imprisonment on the exploitation counts to be followed by lifetime probation on the luring count. This court affirmed his convictions and sentences on appeal. *State v. Souza*, No. 2 CA-CR 2001-0496 (memorandum decision filed Sept. 5, 2003). Souza then filed a petition for post-conviction relief, pursuant to Rule 32, Ariz. R. Crim. P. The trial court summarily dismissed the majority of Souza's claims, including several claims of ineffective assistance of counsel, but it granted an evidentiary hearing on Souza's claim that trial counsel's alleged ineffectiveness had caused him to reject a favorable plea offer.

¶2 Following the evidentiary hearing, the trial court found counsel had "failed to fully explain to [Souza] that he faced mandatory consecutive prison sentences if convicted of multiple counts of sexual exploitation" and had "not fully advise[d Souza] of the strengths and weaknesses of the proposed defense." The court also found that, [a]s a result of these deficiencies, [Souza had] lacked the necessary information to make an informed decision about the merits of settling the case." "Giving [Souza] the benefit of the doubt,"

the court "accept[ed] his testimony that he would have signed the . . . plea agreement had he been fully informed."[1]

¶3 The parties then filed additional memoranda addressing the application of the then newly issued decision by Division One of this court in *State ex rel. Thomas v. Rayes*, 213 Ariz. 326, 141 P.3d 806 (App. 2006), *vacated*, 214 Ariz. 411, ¶ 21, 153 P.3d 1040, 1044 (2007). Relying on Division One's decision in *Rayes*, the trial court found it was without authority to "order the State to reoffer the same plea agreement offered before trial" and instead ordered it to "negotiate in good faith with [Souza] to reach a non-trial disposition." Although the court found vacating Souza's convictions was "not appropriate" because he had "received a fair trial," it stated that it would do so "[i]f an agreement is reached." "If an agreement is not reached," the court stated, "the convictions will stand."

¶4 The parties failed to reach an agreement,[2] and Souza filed this petition for review after the trial court denied his motion to reconsider the relief ordered in light of the

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[1]The proposed agreement had called for lifetime probation for the luring charge but a sentencing range of only ten to twenty years for sexual exploitation, presumably based on Souza's pleading guilty to only a single count.

[2]The state offered an agreement providing that Souza's conviction for luring a minor for sexual exploitation would be dismissed, eliminating the imposition of lifetime probation, but Souza's convictions and sentences on the three counts of sexual exploitation would be retained. Souza rejected the proposal, explaining on review that, "[a]lthough dropping the lifetime probation for the luring count seems to indicate the state's good faith, the fact was that the same prosecutor had already obtained a lifetime probation sentence for Souza in a separate case. . . . Thus, the state offered no benefit." Souza does not appear to contend the state violated the court's order to negotiate in good faith.

supreme court's opinion vacating Division One's decision in *Rayes*. *See Rayes*, 214 Ariz. 411, ¶ 21, 153 P.3d at 1044. He argues that the court "abused its discretion in fashioning an illusory remedy" for violation of the Sixth Amendment to the United States Constitution, and he challenges the trial court's summary dismissal of his other claims. We review a trial court's decision on a petition for post-conviction relief for an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). In this case, we grant review and grant relief in part, but we also deny relief in part.

Claims summarily dismissed

¶5 The trial court explained in detail its rejection of Souza's argument that he was entitled to a new trial on the exploitation charges because, Souza claims, our decision in *State v. Hazlett*, 205 Ariz. 523, 73 P.3d 1258 (App. 2003), constituted a "significant change in the law." *See* Ariz. R. Crim. P. 32.1(g). It also explained its ruling regarding several of Souza's claims of ineffective assistance of counsel, including counsel's use of an entrapment defense or "theme," his failure to present expert testimony on child development, and his failure to have inspected certain photographs before trial. Because the court's order dismissing these claims clearly identified the issues and correctly ruled on them so that any court in the future can understand it, and because the court's findings and conclusions are supported by the record before us, we adopt the trial court's ruling on these issues without further discussion. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.3d 1358,

1360 (App. 1993) (finding "[n]o useful purpose would be served by this court['s] rehashing the trial court's correct ruling in a written decision").

¶6 Nor do we find an abuse of discretion in the court's summary dismissal of the following claims. First, Souza claimed trial counsel had been ineffective in failing to adequately challenge evidence showing the females depicted in the photographs on which the exploitation charges were based were under the age of fifteen. We addressed the sufficiency of this evidence as to counts two and three on direct appeal and determined that the images themselves; the circumstances under which they were sent, including Souza's own statements about the ages of the females depicted therein; and the file names assigned to duplicate images found on Souza's computer, supported the jury's verdicts and the trial court's denial of Souza's motion for judgment of acquittal. Souza contends on review, as he did in his petition for post-conviction relief, that trial counsel was ineffective in: (1) failing to object on hearsay grounds to the introduction of "the images' titles," which included numbers ostensibly referring to the ages of the females depicted therein; (2) failing "to object to prosecutorial vouching and Detective Englander's testimony regarding the participants' ages"; and (3) failing to "adequately oppose the state's motion in limine," in which the state argued "that no expert testimony was needed to determine the ages of those [depicted] in the images." But Souza has failed to show counsel's performance in these respects was either inadequate or prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984) (colorable claim of ineffective assistance requires showing counsel's

performance fell below objectively reasonable standards and "reasonable probability" that, but for deficient performance, outcome of trial would have been different); *see also State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (colorable claim is "one that, if the allegations are true, might have changed the outcome").

¶7 The "images' titles" were file names found on Souza's computer. They thus might arguably have been admissions of a party opponent, which are not hearsay. *See* Ariz. R. Evid. 801(d)(2). But even assuming the file names constituted inadmissible hearsay, Souza did not show a reasonable probability that their exclusion would have affected the outcome of the trial, given the circumstances under which the images were sent. When he sent the images to "Christy," Souza wrote: "I have . . . pictures of girls your age with older guys doing things." He also told "Christy" that two of them showed thirteen-year-old girls and the other showed a girl of "about 11 or 12." Souza argues that counsel "failed to determine the foundation of Souza's alleged belief as to the image participants' ages." But he did not submit an affidavit or other evidence showing his belief was incorrect or unfounded.

¶8 Detective Englander did not testify about the ages of the females depicted in any of the images that formed the basis of the exploitation charges. As to one of those images, he stated he could not tell whether the female in it was over or under eighteen. But he described another image as containing a series of frames showing "an obviously prepubescent girl," and he estimated the age of a female in another picture that did not form

the basis of the exploitation charges as "probably 10, 11 or 12." The jurors, however, could easily assess Englander's testimony by viewing the images themselves. Thus, even assuming his testimony was improper, it was not prejudicial.

¶9 There is simply no evidence of prosecutorial vouching. Souza bases his claim on the prosecutor's question to Englander about whether he had received more information from Souza after receiving the images in which "one of them, obviously, [was] a child." But vouching occurs "'when the prosecutor places the prestige of the government behind [the] witness' or 'where the prosecutor suggests that information not presented to the jury supports the witness's testimony.'" *State v. Garza*, 216 Ariz. 56, ¶ 23, 163 P.3d 1006, 1014 (2007), *quoting State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989).

¶10 Finally, Souza has not cited, nor have we found, any authority supporting his contention that expert testimony was necessary under the facts of this case to prove the images included children under the age of fifteen. We therefore find no abuse of discretion in the trial court's dismissal of Souza's claim that counsel ineffectively challenged the evidence as to age.

¶11 The trial court also rejected Souza's argument that "fundamental error occurred, or trial and appellate counsel were ineffective, because Souza should have been sentenced under A.R.S. § 13-702.02 instead of A.R.S. § 13-604.01." On review, Souza acknowledges that the trial court's ruling was based on the decision of this court in *State v.*

Hollenback, 212 Ariz. 12, 126 P.3d 159 (App. 2006). He asks us to reconsider that decision based on the very argument we rejected in that case. We decline to do so.

Ineffective assistance of counsel during plea negotiation

¶12 In *State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000), Division One of this court held that "a defendant may state a claim for post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make an uninformed decision to reject a plea bargain and proceed to trial." It also held that the remedy for such ineffective assistance may include an order that "the prosecution . . . reinstate a plea offer if, after conducting a hearing and permitting the State to present all relevant considerations, the court finds reinstatement necessary to remedy a deprivation of effective counsel." *Id.* ¶ 44. "If renewal of the plea offer is not appropriate, the probable alternative remedy will be to order a new trial." *Id.* ¶ 45.

¶13 In this case, the trial court found Souza had "proven his *Donald* claim" but found "the precise nature of the remedy to be fashioned is open to debate in light of *Rayes*." There, a divided panel of Division One of this court disagreed with *Donald* and held that separation of powers principles prohibit a trial court from compelling the state to reoffer a plea agreement. *Rayes*, 213 Ariz. 236, ¶ 29, 141 P.3d at 817. As noted above, the trial court in this case allowed the parties to address the application of Division One's decision and then fashioned a remedy relying on it. When the supreme court vacated the court of appeals decision in *Rayes*, Souza moved for reconsideration of the appropriate remedy, but the trial

court denied the motion, stating it was "not persuaded" that the supreme court's decision "require[d] a different result." Souza argues the trial court imposed an "illusory remedy" that did not comport with *Donald* and thus abused its discretion by failing to follow that authority.

¶14 *Donald* has been thoughtfully and compellingly criticized by members of both divisions of this court, both for its conclusion that a defendant can suffer constitutionally significant prejudice in rejecting a plea offer due to the ineffective assistance of counsel, *see State v. Vallejo*, 215 Ariz. 193, ¶¶ 10-16, 158 P.3d 916, 919-21 (App. 2007) (Howard, J., concurring), and its conclusion that a court may order the state to reinstate a plea offer without offending separation of powers principles, *see Rayes*, 213 Ariz. 326, ¶¶ 21-26, 141 P.3d at 814-16, *vacated*, 214 Ariz. 411, ¶ 21, 153 P.3d at 1044. *See also Donald*, 198 Ariz. 406, ¶¶ 48-52, 10 P.3d at 1205-06 (Berch, J., concurring). Nonetheless, the decision remains binding on the trial court. *See Tucson Gas & Elec. Co. v. Superior Court*, 9 Ariz. App. 210, 212, 450 P.2d 722, 724 (1969) ("Generally, the final decision of an intermediate appellate court, when not reviewed or otherwise set aside by an appellate court of higher authority, has the same finality as a decision of the highest court.").

¶15 In response to Souza's petition for review, the state does not challenge either the trial court's determination that Souza was prejudiced by counsel's explanation of the plea offer or the court's authority to order the remedies Souza is requesting, nor does it argue to this court that *Donald* was wrongly decided. Therefore, the validity of *Donald* is not an issue

before us, and we do not address the merits of the decision here. Rather, we assume without deciding, based on the trial court's specific findings, that Souza suffered remediable prejudice under the Sixth Amendment by rejecting the state's plea offer based on counsel's deficient performance and that the remedies authorized in *Donald* may apply here. *See State v. Jackson*, 209 Ariz. 13, ¶ 4, 97 P.3d 113, 115 (App. 2004) ("[a]ssuming, without deciding, that *Donald* was correctly decided"); *cf. Vallejo*, 215 Ariz. 193, ¶ 7, 158 P.3d at 198 (refusing to extend *Donald* without addressing its merits). We determine only whether, under *Donald*, the trial court fashioned an illusory remedy by ordering the parties to negotiate in good faith with the caveat that, should negotiations fail, Souza's convictions and sentences would stand.

¶16 As the Supreme Court has stated, "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981); *see also Donald*, 198 Ariz. 406, ¶ 31, 10 P.3d at 1202. Again, assuming without deciding that the remedies authorized in *Donald* are permissible for the Sixth Amendment violation in this case, we must determine whether they were necessary here or whether the remedy imposed by the trial court was sufficiently tailored to the injury Souza suffered.

¶17 Although the court in *Donald* did not specifically identify the injury a defendant suffers in rejecting a plea due to ineffective assistance of counsel, it concluded that

"*the loss of a favorable plea agreement* due to ineffectiveness of counsel is not relieved by the defendant's receipt of a fair trial." 198 Ariz. 406, ¶ 46, 10 P.3d at 1205 (emphasis added). Our supreme court explained in *Rayes* that "the crux of any claim of ineffective assistance of counsel during plea negotiations . . . is that but for the deficient performance of counsel the defendant would have obtained a result more favorable than the actual disposition of the case." 214 Ariz. 411, ¶ 13, 153 P.3d at 1043. And the trial court in this case found that, but for counsel's ineffective assistance, Souza "would have signed" the plea agreement offered by the state. Viewing Souza's prejudice as the loss of the specific plea agreement he otherwise would have accepted, the court's order to renegotiate in good faith did not remedy that prejudice because the state was unwilling to offer the same or an equally beneficial agreement. The state argues that the offer it made during renegotiation was to Souza's "advantage . . . because he would not have been subject to two potential prison terms, one in Maricopa County and one in Pima County, for any violation of his lif[et]ime probation." But it conceded below that the offer was "not as generous" as its previous offer. And, although it offered to dismiss the luring count for which the trial court had imposed lifetime probation, it does not contest Souza's assertion that "the same prosecutor had already obtained a lifetime probation sentence for Souza in a separate case."

¶18 The court in *Donald* recognized that ordering the prosecution to reinstate a plea offer may not be appropriate in certain cases and that the "probable alternative remedy will be to order a new trial." 198 Ariz. 406, ¶ 45, 10 P.3d at 1205. Although such a remedy

is imperfect in that it does not restore a defendant to the position he was in when counsel performed deficiently, such an order at least places a defendant in the same bargaining position he occupied prior to the original plea offer. As the state conceded below, the benefit to the state in negotiating plea agreements "is the avoidance of trial." Thus, by foreclosing the possibility of a new trial before the new negotiations began, the trial court's order in this case placed Souza in an inferior bargaining position.

¶19 The court in *Donald* recognized that, "[i]nevitably, . . . when a court seeks to redress such an injury, some degree of remedial burden must be borne" and concluded that "[t]he expense and burden of trial . . . do not excuse the court from providing a remedy for violation of a defendant's Sixth Amendment rights." 198 Ariz. 406, ¶¶ 31-32, 10 P.3d at 1202-03. Although a new trial, in and of itself, does not remedy the Sixth Amendment violation in this case, it goes further toward returning the parties to the status quo before the violation. *See Donald*, 198 Ariz. 406, ¶ 40, 10 P.3d at 1204; *see also, e.g., People v. Curry*, 687 N.E. 2d 877, 890-91 (Ill. 1997). And the state has not argued that a new trial would significantly infringe upon its interests.

¶20 Thus, we conclude the trial court's order did not afford a sufficient remedy for the Sixth Amendment violation it found. We therefore remand this matter, as Souza has requested, for the court to determine, pursuant to *Donald*, whether plea reinstatement is appropriate and, if not, then to vacate the convictions and order a new trial.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge